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March 30, 2007

Via ECF and Overnight Mail

Honorable Susan D. Wigenton, U.S.M.J.
United States District Court
M.L. King, Jr. Federal Bldg. & Courthouse
Room 2037
50 Walnut Street
Newark, New Jersey 07102

Re: Combined Companies, Inc., et al. v. AT&T
Civil Action No. 93-5456

Dear Judge Wigenton:

A. Introduction

This law firm represents plaintiffs Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. ("the Inga Companies") in this matter. We are advised that Your Honor has been assigned this case as a result of Judge Bassler's recent retirement. We are writing to respond to defendant AT&T's recent letter in advance of the April 2, 2007 telephone conference.

In addition, we are writing to request that this Court also resolve a pending issue concerning the scope of Judge Bassler's primary jurisdiction referral to the FCC. AT&T has flip-flopped its position in a thinly veiled attempt to delay this matter at the FCC. Thus, this letter sets forth a critical issue that requires a

resolution so that the FCC can fully and properly decide all non-disputed issues of this case.

As the Court is aware, this litigation began twelve years ago in 1995. Since the litigation has been so lengthy, we will first provide the Court with a brief background and a procedural history so that it will more clearly understand the issues. We will then address plaintiffs' issue concerning the primary jurisdiction referral. Finally, we will address AT&T's request for a modification of the Court's prior Order concerning an AT&T contact person.

B. Background and Status

1. History

The Inga Companies, Combined Companies, Inc. and Public Services Enterprises ("PSE") were aggregators of long distance service consisting of primarily toll free services. Aggregators group together businesses ("end-users") to aggregate substantial revenue in order to obtain a large volume discount from AT&T. The aggregators share the percentage of the discount with end-users in order to make a profit. The specific discount plan, CSTPII/RVPP, had a 28% discount due to its commitment of approximately \$42 million in service per year. In practice, plaintiffs would advise AT&T to bill the end-user, e.g. at 20% off the base rate, and the extra 8% would then be paid by AT&T to plaintiffs' compensation account. In 1994, plaintiffs controlled 25% of this cottage industry that included

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approximately 100 competitors. AT&T was under FCC mandate to permit aggregation to benefit the public but AT&T did everything possible to stop it. All aggregators were put out of business by AT&T--- many settled----and this is the last case.

At the end of 1994, the Inga Companies and CCI co-owned the 28% plans. Another aggregator, PSE, brought suit against AT&T and obtained a much more favorable 66% discount plan (CT-516) despite only committing to \$4.2 million per year of aggregate revenue, just one-tenth of CCI and Inga's commitment. Plaintiffs had sought the same 66% plan as well as others but AT&T refused access to a contract even though plaintiffs qualified for it, which led to discrimination claims. In order to gain access to the deeper discounts, the Inga Companies and CCI requested that AT&T transfer most of its end-users to PSE's 66% AT&T discount plan, to earn the greater discount and profit on plaintiff's \$54.4 million in business as of January 1995. A contractual arrangement with PSE permitted the Inga Companies and CCI to take the account traffic back from PSE. At the time of the January 1995 traffic-only transfer, AT&T's own testimony showed that the fiscal year revenue commitment had already been made and AT&T has conceded to the FCC that plaintiff's plans were grandfathered from shortfall and termination penalties in any event till at least June of 1996; which was 18 months after the denied traffic only transfer.

2. Judge Politan's Rulings

Not wanting to grant the larger discount to its largest aggregator, AT&T permanently denied the traffic only transfer and plaintiffs brought suit. In an initial May 1995 decision, Judge Politan ruled against AT&T, holding that the plans and all the corresponding account traffic was properly transferred. AT&T did not appeal this decision. However, a second transfer from CCI/Inga to PSE which transferred much of the traffic only without transferring the corresponding plans also was reviewed by Judge Politan. Initially, Judge Politan refused to rule on this traffic only transfer because AT&T represented to the Court that a pending FCC Transmittal 8179 would resolve the issue. The FCC advised AT&T that it was going to rule against it on Transmittal 8179 and therefore AT&T withdrew the transmittal instead of receiving an adverse determination. Judge Politan took testimony and ruled on this issue in March 1996. Judge Politan ruled that a traffic-only transfer was permissible under the applicable AT&T Tariff Section 2.1.8. Judge Politan also understood that plaintiffs' plans revenue commitments remained with the plans which is the question Judge Bassler referred. In addition, Judge Politan also rejected AT&T's claim that it had a right to assess shortfall and termination ("S&T") charges, as the plans were ordered prior to June 17, 1994 and thus grandfathered. Consequently, the Court entered an injunction against AT&T.

3. The Third Circuit Ruling

In 1996, AT&T appealed Judge Politan's ruling to the Third Circuit. The Third Circuit did not address the merits of Judge Politan's decision; instead, the Third Circuit vacated Judge Politan's decision, holding that the FCC, and not this Court, had primary jurisdiction concerning the interpretation of Section 2.1.8. This case was stayed pending the referral to the FCC.

In 1997, plaintiffs filed a Supplemental Complaint under the same docket number, claiming that AT&T illegally inflicted S&T charges on end-user accounts in June of 1996, and March 1997, and instantaneously ended plaintiffs' business overnight. The Supplemental Complaint included only the Inga Companies and CCI; as by this time, PSE had dropped out of the litigation because its interests were being advanced by CCI/Inga. Ultimately, Judge Hedges added plaintiffs' Supplemental Complaint to the stay entered by the Third Circuit in 1996. AT&T also filed a Counterclaim to the Supplemental Complaint on shortfall charges that was also stayed.

4. The FCC Ruling

The original question referred by Judge Politan was whether or not Section 2.1.8 allowed traffic-only transfers. In 2003, the FCC finally ruled that Section 2.1.8 did not apply to how "traffic only" could be transferred. Despite the fact that plaintiffs' used Section 2.1.8 to effectuate the traffic-only transfer, the FCC found that AT&T violated Section 203(c) of the Communications Act due to the fact that

traffic-only transfers were allowed under a different section of AT&T's tariff (3.3.1.Q.4); thus, plaintiffs' traffic-only transfer was not prohibited. The FCC decision clearly shows, and it was briefed by the FCC to the DC Circuit, that the FCC only used Section 2.1.8 to determine which obligations transferred.

5. The D.C. Circuit's Ruling

AT&T appealed the FCC's decision to the D.C. Circuit. In 2005, the D.C. Circuit ruled that Section 2.1.8, as used by plaintiffs, was indeed the applicable traffic-only transfer tariff section. Thus, it affirmed that "traffic only" could be transferred—not just the entire plan. However, the D.C. Circuit stated that it was not deciding precisely which obligations were to be transferred on a traffic only transfer.

6. Judge Bassler's Ruling

After the D.C. Circuit ruled, plaintiffs filed a motion in this Court to lift the stay previously imposed by this Court. Plaintiffs argued that the stay should be lifted because the D.C. Circuit ruled that plaintiffs' traffic-only transfer was permissible, which was the sole question referred by the Third Circuit. Judge Bassler, nevertheless, denied plaintiffs' motion, finding that the D.C. Circuit's opinion left open a question of interpretation concerning which obligations were transferred on a traffic-only transfer. After the Third Circuit's referral the FCC

Decision states that it had AT&T and plaintiffs additionally supplement the traffic only transfer issue with briefs on the shortfall issues.

Thus, Judge Bassler ordered plaintiffs back to the FCC to resolve this issue as well the shortfall issues and discrimination issues which AT&T argued to Judge Bassler were all open and best interpreted by the FCC.

7. The Scope Of The Primary Jurisdiction Referral

In referring the matter to the FCC, Judge Bassler stated:

It is further ordered that plaintiffs, no later than August 1, 2006, file an appropriate proceeding under Part I of the FCC's rule to initiate an administrative proceeding to involve the issue of precisely which obligations should have been transferred under Section 2.1.8 of Tariff No. 2 **as well as any "other issues left open"** by the D.C. Circuit's opinion in AT&T Corp. v. Federal Communications Commission, 394 F.3d 933 (D.C. Cir. 2005).

Judge Bassler's referral is the issue which we need to raise with the Court. Specifically, in all previous filings with the FCC and Courts from 1995 through 2005, AT&T consistently took the position that the FCC should rule and interpret the tariffs covering all collateral issues regarding the improper infliction of shortfall and termination charges and whether AT&T discriminated against plaintiffs. To get the case referred by the District Court to the FCC, AT&T asserted to Judge Bassler that all issues were **interpretive**, so the District Court could not rule, and that there were no disputed issues of fact. After plaintiffs filed its FCC brief and

AT&T evaluated plaintiffs' evidence on the shortfall issues and the discrimination issues, AT&T reversed its position before the FCC. Contrary to its original position, AT&T has now argued to the FCC that there are disputed issues of fact concerning the shortfall issues and the discrimination issues, despite providing the FCC with no evidence of disputed facts. Incredibly, AT&T also argued that the shortfall issues and the discrimination issues were no longer even before the FCC despite fully briefing all issues----just in case the FCC ruled. With the uncertainty of not knowing if the FCC would resolve all "open issues", as requested by the District Court, plaintiffs asked the FCC to let plaintiffs know whether the FCC intended to resolve the shortfall issues and discrimination issues. On January 12, 2007, the FCC entered an Order stating that the shortfall and discrimination issues were not specifically referred to the FCC, even though these issues had been before it in the FCC's first ruling in 2003. Additionally, the FCC's General Counsel had stated in 2005 that plaintiffs could request whatever declaratory ruling it wanted whether or not it was eventually specifically referred by the District Court. Plaintiffs filed for reconsideration of the FCC's January 12, 2007 Order noting that its decision was issued prior to plaintiffs' scheduled reply brief and several additional briefs thereafter. The FCC has not issued a decision on plaintiffs' reconsideration request despite the fact that it is two months since the request. On Wednesday, March 28, 2007, the FCC was requested to provide a time when it would be deciding plaintiffs'

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reconsideration and to advise the parties by Friday March 30, 2007 to give this Court guidance on the scope of the referral.

On March 14, 2007 the IRS itself issued a primary jurisdiction referral to the FCC asking the FCC to resolve all the shortfall telecom issues to determine whether shortfall charges were permissible or not, so as to establish a taxable base to pursue AT&T on hundreds of millions in tax evasion charges; and several states are now also investigating AT&T.

The FCC advised the parties within its 2003 decision and also on January 12, 2007 that if there were disputed facts the District Court is the place to go to resolve the disputed facts. Plaintiffs filed supplemental briefs at the FCC demanding that AT&T state what the actual disputed facts were, instead of simply stating that there were disputed facts. AT&T has simply continued to claim that there are disputed facts so the FCC won't rule, despite evidencing no disputed facts.

AT&T's newly minted "disputed facts" position is a thinly veiled attempt to have this matter languish in the FCC and hope there is no ruling. AT&T is in a catch-22. If the shortfall charges are permissible, AT&T owes many millions in taxes; if the charges are not permissible AT&T loses the telecom case. AT&T loses either way and, as a result, plaintiffs are being whip-sawed by AT&T's incredible new position that it does not want the shortfall issues decided at all. This Court has referred this case to the FCC for rulings on all issues. There was absolutely no

reason to add in the referral: “as well as any other issues left open” ---if the traffic only transfer issue is all that the Court wanted interpreted by the FCC. However, the FCC will not rule on issues where there is a disputed issue of fact, stating in its previous opinion that questions of fact must be resolved by the District Court.

Our request to this Court is simple. We are requesting that this Court enter a Supplemental Primary Jurisdiction Referral Order clarifying that this Court’s primary jurisdiction referral to include all discrimination issues and to advise the FCC that there are no disputed facts regarding all shortfall issues unless AT&T can show this Court that there are disputed facts. If there are legitimate disputed facts, the disputed facts could then be resolved by the District Court. Accordingly, we would like to discuss this issue further during the conference call so all interpretive issues can be expeditiously resolved at the FCC, which will allow this Court to further proceed.

C. AT& T’s Application

AT&T has applied to the Court to modify a previous Court Order so as to change Mr. Inga’s contact to an attorney involved in the litigation. In making its application, AT&T has totally mischaracterized the prior Court Order and why it

was put into effect in the first place. Some background is needed for this Court to fully understand the issue.

In June of 1996, AT&T wrongfully applied shortfall charges on plaintiffs' end-users despite numerous statements in Judge Politan's May 1995 and March 1996 decisions which made it clear that the plans should be immune from such charges. As a result of AT&T's ill-advised behavior, thousands of plaintiffs' end-users were assessed charges which increased the average \$300 phone bill to now include a \$10,000 charge. AT&T directed these end-users to call plaintiffs' office on a toll-free number (at 20¢ a minute in 1996), after AT&T had already cut off all plaintiff's income by assessing the shortfall charges that Judge Politan found were not applicable to these plans. AT&T shrewdly advised end-users to call plaintiffs and asked to be removed from plaintiffs' plan. AT&T advised the end-user that it would then remove the charges that AT&T should not have assessed in the first place.

Recognizing the outrageousness of the tactic, Judge Politan ordered AT&T to have every single manager in every customer service office in the country to notify their staff not to call plaintiffs and to post it in a conspicuous place. In addition, Judge Politan provided an AT&T contact for plaintiffs. However, when plaintiffs attempted to reach the contact, they found that the number had been disconnected. AT&T subsequently misrepresented that the contact had been laid off, but that was

not the case. Moreover, AT&T's counsel, Richard Brown, wrongfully designated himself as the contact.

AT&T had asserted that it did not attempt to change the contact until after the October 17, 2003 FCC ruling. That assertion is incorrect. AT&T's attempt to change the contact person occurred many months prior to the FCC's ruling. Moreover, AT&T had no authority at that time to change the contact person.

Once it finally recognized it was in violation of Judge Politan's Order, AT&T assigned Tom Umholtz as the new contact person, even though the original contact was still working at AT&T. Significantly, Judge Bassler did not place any prohibitions on what type of information plaintiffs could present to Mr. Umholtz.

Further, it is unnecessary to force plaintiffs to incur the expenses utilizing its counsel to forward information to AT&T's counsel. Indeed, petitioners have made numerous filings as a "public commenter" and filed its brief directly with AT&T in accordance with FCC guidelines.

In addition, the Court should note that some of the FCC's filings were made by one of plaintiffs' non-telecom companies, TIPS Marketing Services, Corp. ("TIPS"). The Court Order does not include TIPS.

Moreover, in its application, AT&T does not present the Court with any of the subject emails. The reason that AT&T does not present the content of these emails

is that there is nothing in the emails that evidences the characterization that AT&T gives to the emails.

In short, AT&T has no evidence of a violation of the Court Order. Indeed, when AT&T asked Judge Bassler in 2003 to modify the August 1997 Order, Judge Bassler said he understood that the content of the emails contained settlement proposals and copies of Court and FCC filings. Appropriately, Judge Bassler did not modify the Order as to what could be stated.

In sum, AT&T has presented this Court with no legitimate reason to modify the Order and its hands are far from clean in this instance. Accordingly, AT&T's application should be summarily denied.

D. AT& T Should Provide A Courtesy Copy Of Previously Filed Briefs

We would also ask this Court to order AT&T to provide copies of both November 1995 briefs it filed with this District Court. The Pacer system does not have these 1995 filings on line and it would cost a considerable amount of time and money to retrieve them from the New Jersey District Court archive center in St. Louis, Missouri. Judge Politan's Decision states that these AT&T briefs explicitly answer, in favor of plaintiffs, Judge Bassler's referral question regarding precisely which obligations transfer on a traffic only transfer. The FCC has also been advised that these AT&T "concession" briefs are being attempted to be obtained, so the FCC is waiting on these AT&T briefs as well.

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Respectfully,

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